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Attorneys for HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE
HOLDERS OF NOMURA HOME EQUITY LOAN, INC., HOME EQUITY
LOAN TRUST, SERIES 2007-1

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

In re

GERRY V DUQUE AND ROSALINA N
DUQUE,

Debtor(s).

HSBC BANK USA, NATIONAL
ASSOCIATION, AS TRUSTEE FOR THE
HOLDERS OF NOMURA HOME EQUITY
LOAN, INC., HOME EQUITY LOAN
TRUST, SERIES 2007-1,

Movant,

vs.

GERRY V DUQUE AND ROSALINA N
DUQUE, Debtor(s); JAMES EDWARD
SALVEN, Chapter 7 Trustee,

Respondents.

Case No. 09-60204-A

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

LBR 4001-1 and 9014-1(f)(2)

DATE: December 15, 2009
TIME: 1:30 p.m.
CTRM: 11

2500 Tulare Street,
Fresno, CA 93721-1318

HSBC Bank USA, National Association, as Trustee for the holders of Nomura Home Equity
Loan, Inc., Home Equity Loan Trust, Series 2007-1 ("Movant"), moves this court for an order
terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and
continue all acts necessary to enforce its security interest in real property generally described as

1 11747 Red Water Court, Las Vegas, Nevada 89123.

2 On or about October 22, 2009, Gerry V Duque and Rosalina N Duque ("Debtors") filed a
3 voluntary petition under Chapter 7 of the Bankruptcy Code, and James Edward Salven was
4 appointed as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against
5 Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

6 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I.**

9 **MOVANT IS ENTITLED TO RELIEF FROM THE**
10 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

11 **NO EQUITY**

12 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
13 debtor does not have any equity in the property and the property is not necessary to the debtor's
14 effective reorganization.

15 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
16 § 362(d)(2) reflects congressional intent to allow creditors to
17 immediately proceed against the property where the debtor has no
18 equity and it is unnecessary to the reorganization, even where the
19 debtor can provide adequate protection under § 362(d)(1). (Emphasis
20 added).

21 Id. at 610 (emphasis added).

22 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
23 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
24 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from
25 stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir.
26 1984).

27 An appropriate cost of sale factor should also be added to determine if the debtor has any
28 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
(Bankr. S.D. Cal. 1982).

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1 On or about October 17, 2006, Gerry V Duque and Rosalina N Duque ("Debtors"), for
2 valuable consideration, made, executed and delivered to PNC Bankcorp ("Lender") a Note in the
3 principal sum of \$246,250.00 (the "Note"). Pursuant to the Note, Debtors are obligated to make
4 monthly principal and interest payments commencing December 1, 2006, and continuing until
5 November 1, 2036, when all outstanding amounts are due and payable. The Note provides that, in
6 the event of default, the holder of the Note has the option of declaring all unpaid sums immediately
7 due and payable. A true and correct copy of the Note is attached to the concurrently served and filed
8 Exhibits to the Declaration in Support of Motion for Relief From Automatic Stay ("Exhibits") as
9 exhibit A and incorporated herein by reference.

10 On or about October 17, 2006, the Debtors made, executed and delivered to Lender a Deed
11 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
12 described as 11747 Red Water Court, Las Vegas, Nevada 89123 (the "Real Property"), which is
13 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs
14 incurred as a result of the Debtors' bankruptcy case may be included in the outstanding balance
15 under the Note. The Deed of Trust was recorded on October 30, 2006, in the Official Records of
16 Clark County, State of Arizona. A true and correct copy of the Deed of Trust is attached to the
17 Exhibits as exhibit B and incorporated herein by reference.

18 Subsequently, Lender's beneficial interest in the Note and Deed of Trust was sold, assigned
19 and transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust
20 evidencing the Assignment of the Deed of Trust to Movant is attached to the Exhibits as exhibit C
21 and incorporated herein by reference.

22 The obligation under the Note is in default as of March 1, 2009, for failure to make payments
23 to Movant. As of November 5, 2009, the total obligation due and owing under the Note is in the
24 approximate amount of \$261,658.13, representing the principal balance of \$245,952.94, interest in
25 the sum of \$11,931.41, late charges in the amount of \$587.97, a recoverable balance in the amount
26 of \$3,152.06, and other charges in the amount of \$33.75. This is an approximate amount for
27 purposes of this Motion only, and should not be relied upon as such to pay off the subject loan as
28 interest and additional advances may come due subsequent to the filing of the Motion. An exact

1 payoff amount can be obtained by contacting Movant's counsel. Further, Movant has incurred
2 additional post-petition attorneys' fees and costs in bringing the instant Motion. Moreover, the total
3 arrears under the Note are in the approximate sum of \$12,381.30, excluding the post-petition
4 attorneys' fees and costs incurred in filing the instant Motion.

5 As a result of the default under the Note, a Notice of Default was recorded on June 20, 2009.

6 **II.**

7 **RELIEF FROM STAY**

8 **LACK OF EQUITY**

9 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and
10 Statements, the fair market value of the Property is \$180,000.00. True and correct copies of the
11 Debtors' bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as exhibit D
12 and incorporated herein by reference.

13 Based on the above, Movant maintains that the equity in the Property is as follows:

14	Fair Market Value:	\$180,000.00
15	Less:	
16	Movant's Trust Deed	\$261,658.13
17	Central Mortgage Company's 2 nd Trust	\$68,005.00
18	Deed	
19	Costs of Sale (8%)	<u>\$14,400.00</u>
20	Equity in the Property:	<\$164,063.13>

21 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
22 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
23 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

24 Debtors' Statement of Intent indicates it is the intent of the Debtors to surrender the Real
25 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtors'
26 Statement of Intent is attached to the Exhibits as exhibit E and incorporated herein by reference.

27 **III.**

28 **MOVANT IS ENTITLED TO RELIEF FROM THE**
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

CAUSE - LACK OF ADEQUATE PROTECTION

Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate
protection of its interest in the Property.

1 Movant submits that adequate protection in this case requires normal and periodic cash
2 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
3 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

4 Movant is informed and believes that Debtors are presently unwilling or unable to provide
5 adequate protection to the Movant and there is no probability that adequate protection can be
6 afforded to Movant within a reasonable time.

7 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
8 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

9 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

10 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by
11 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

12 2. That the 10-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

13 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
14 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
15 the Property;

16 4. Permitting Movant to offer and provide Debtors with information re: a potential
17 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
18 Mitigation Agreement, and to enter into such agreement with Debtors;

19 5. Alternatively, in the event this court declines to grant Movant the relief requested
20 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
21 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
22 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay
23 when due (a) the monthly installments of principal and interest, as required under the Note;
24 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in order to
25 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
26 filing of this motion;

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28 ///

1 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
2 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;
3 and

4 7. For such other and further relief as the court deems just and proper.

5 Dated: November 18, 2009

PITE DUNCAN, LLP

6 /s/ Erin L. Laney CA SBN 259863

7 ERIN L. LANEY

8 Attorneys for HSBC BANK USA, NATIONAL
9 ASSOCIATION, AS TRUSTEE FOR THE
10 HOLDERS OF NOMURA HOME EQUITY LOAN,
11 INC., HOME EQUITY LOAN TRUST, SERIES
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